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PAR VALUE AND NON PAR VALUE STOCK.—A purchaser under a contract cannot be compelled to accept something different from that for which he contracted, even though what is offered is better than the contract calls for.[1] This is sound both in principle and good sense, for unless one can get what he bargains for, the purpose of contracting is defeated. Accordingly, the law implies a warranty that the goods will be as described.[2]

The principles governing contracts to buy and sell ordinary goods and chattels are equally applicable to contracts to purchase stock.[3] Thus one who has contracted for common stock cannot be compelled to take preferred stock or *vice versa*.[4] A contract to purchase stock of a corporation is not fulfilled by delivery of stock of the same corporation having different directors than those represented.[5] Where the contract calls for stock in the X corporation, the delivery of stock of a subsequent corporation which has acquired all the assets of the X corporation will not do.[6] Nor can a subscriber whose contract is to take stock as an original subscriber be compelled to accept stock subscribed for by, or issued to, other persons.[7] Where the contract called for shares of a par value of $1, a corporation empowered to issue only shares of a par value of $5 was said to be in no position to perform the contract.[8] And it has been held innumerable times that a person who subscribed to stock in a corporation to be formed can not be held on his contract of subscription where the corporation formed has different powers,[9] or the capital stock is different in amount,[10] from that which the subscriber had a right to believe when he entered into the contract.

A case involving a very interesting point along these lines was recently litigated in a lower New York Court. The facts material to the point at issue were as follows: The defendant corporation made a contract with the plaintiff whereby the defendant agreed to sell and the plaintiff to buy ninety shares of $50 par value stock of the defendant corporation. $900 was paid on account, the balance to be paid in installments. The plaintiff was to have none of the rights of a stockholder until full payment. Subsequently the defendant took proceedings under § 24 of the New York Stock Corporation Law changing from stock of $50 par value to stock without a nominal or par value, each holder of a $50 par value share to receive a share without par value. The plaintiff claimed that by so doing the defendant had put it out of its power to perform the contract and sought to recover the $900 paid. The Court in refusing recovery held, among other things,[11] that inasmuch as a share of stock with no par value is substantially the same as a share with a

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[1] *Schultze* v. *Goodstein* (1905) 180 N. Y. 248, 73 N. E. 21; *Bach* v. *Levy* (1886) 101 N. Y. 511, 5 N. E. 345.

[2] *Hawkins* v. *Pemberton* (1872) 51 N. Y. 198.

[3] *Wheeler* v. *Ocker & Ford Mfg. Co.* (1910) 162 Mich. 204, 127 N. W. 332.

[4] *Railroad* v. *Knoxville* (1896) 98 Tenn. 1, 37 S. W. 883; *Bankers Trust and Okell* (1916) 22 B. C. 436, 27 Dom. L. R. 63; *Re Bankers Trust and Barnsley* (1915) 21 B. C. 130, 121 Dom. L. R. 623.

[5] *Johns* v. *Coffee* (1913) 74 Wash. 189, 133 Pac. 4.

[6] *Craig Silver Co.* v. *Smith* (1895) 163 Mass. 262, 39 N. E. 1116; *People's Nat. Bk.* v. *Taylor* (1915) 17 Ariz. 215, 149 Pac. 763.

[7] *Gray* v. *Ellis* (1913) 164 Cal. 481, 129 Pac. 791.

[8] See *Gettysburg Bk.* v. *Brown* (1902) 95 Md. 367, 388, 52 Atl. 975.

[9] *Woods Motor Vehicle Co.* v. *Brady* (1905) 181 N. Y. 145, 73 N. E. 674; *Midland City Hotel Co.* v. *Gibson* (1912) 11 Ga. App. 829, 76 S. E. 600.

[10] *Newport Cotton Mill Co.* v. *Mims* (1899) 103 Tenn. 465, 53 S. W. 736.

[11] The court based its decision on two other grounds besides the one herein treated. First, that the plaintiff's contract was made subject to the power of the Legislature to permit the alteration made, and it is neither a defense to an action on the contract nor grounds for rescission thereof that the change was made when it was made pursuant to legislative grant of power. Secondly, that the plaintiff, having failed to pay the first installment when due, was in default. No attempt is made in this note to treat these two points.

nominal par value, the defendant was still in a position to perform. *Paul* v. *Pacific Development Corporation* (N. Y. City Court 1922) 66 N. Y. L. J. 2214.

Had the contract sued upon been of the ordinary stock subscription variety where the subscriber, having a voice in the affairs of the corporation, is a stockholder and is treated as such, the plaintiff would have been bound by the will of the majority of his fellow-stockholders and could not complain of the change made.[12] But the plaintiff here was to have none of the rights of a stockholder until he had paid in full. This, it would seem, makes the contract in question a contract of purchase rather than one of technical subscription,[13] and therefore governed by the general principles of contract.

The Court in the instant case holds that the plaintiff could get what he bargained for. The Court's language seems to be susceptible of two distinct interpretations: first, that there was a mere formal change, *i. e.,* that the non par value stock is the same stock that was contracted for, changed only in name; or, secondly, that, though not the same, the difference between the two is so slight that a delivery of the one is a substantial performance of a contract calling for the other. If the first is the meaning intended and if the proposition itself is true, the decision is clearly sound,[14] as it would seem obvious that if a person contracts to sell his yacht "Neptune," he is still in a position to perform his contract though he change its name to "Shamrock" before the delivery day. But if the Court means that a substantial performance, in contrast to strict compliance, is sufficient then another question presents itself. Should the court in an action for money had and received, which though a law action is equitable in its nature and governed by equitable principles,[15] allow one, who has deliberately put literal performance out of his power,[16] to claim that a substantial performance is sufficient? The law courts generally recognize the doctrine of substantial performance in certain kinds of purely legal actions,[17] but they confine it to one who has been at most negligent.[18] Equity, too, recognizes the doctrine of substantial performance,[19] and refuses to inflict hardship where one is not at fault.[20] But is it an equitable principle that one should be allowed to substitute a substantial performance where he has deliberately and for his own advantage put literal performance out of his power? These questions become important in the solution of the instant case according to what is considered to be the difference, if any, between stock with and stock without a nominal par value.

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[12] *Schenectady & Saratoga Plank Road Co.* v. *Thatcher* (1854) 11 N. Y. 102; *Troy & Rutland R. R.* v. *Kerr* (N. Y. 1854) 17 Barb. 581; *C. H. Venner Co.* v. *United States Steel Corp.* (C. C. 1902) 116 Fed. 1012 (*semble*).

[13] *Kohlmetz* v. *Calkins* (1897) 16 App. Div. 518, 44 N. Y. Supp. 1031.

[14] *Cf. Planters' & Merchants' Independent Packet Co.* v. *Webb* (1908) 156 Ala. 551, 46 So. 977; *Yonkers Gazette Co.* v. *Taylor* (1898) 30 App. Div. 334, 51 N. Y. Supp. 969.

[15] *Eddy* v. *Smith* (N. Y. 1835) 13 Wend. 488; *Atkinson* v. *Scott* (1877) 36 Mich. 18; *Law* v. *Uhrlaub* (1902) 104 Ill. App. 263.

[16] It should be noted that the defendant voluntarily made the change complained of; it was not compelled to do so by the legislature.

[17] Woodward, *The Law of Quasi Contracts* (1913) § 175.

[18] *Jacob & Youngs* v. *Kent* (1921) 230 N. Y. 239, 129 N. E. 889 (where a plaintiff, who was innocent of the literal breach, or was at most negligent, was allowed to recover in an action on the contract, though he had only substantially performed); *Schultze* v. *Goodstein, supra,* footnote 1 (recovery refused where the plaintiff wilfully failed to comply with the terms of the contract); see (1921) 21 COLUMBIA LAW REV. 278.

[19] 5 Pomeroy, *Equity Jurisprudence & Equitable Remedies* (2d ed. 1919) §§ 2254, 2255.

[20] *Waddle* v. *Cabana* (1917) 220 N. Y. 18, 114 N. E. 1054 (the fact that the contract called for the personal note of the plaintiff's intestate, whose death made literal performance impossible, was held no bar to the action).

Non par value stock legislation in this country came into favor during the past ten years partly out of a desire to correct prevalent evils attending the issuance of corporate stock and partly to facilitate the marketing of stock issues. The theory of its proponents was that the arbitrary dollar mark on the stock certificate has nothing to do with the real value of the shares which the certificate symbolized; that a share of stock is nothing more nor less than a right to share in an aliquot or fractional part of the corporate assets, which in turn depend on the financial condition of the corporation. Consequently, they contended, the popular misconception that the par value is the true value will be removed, and inexperienced purchasers of stock less easily deluded by fictitious values if stock could be issued without par value.[21] Accordingly, several states, of which New York was the first, enacted statutes permitting the issuance of stock without par value.[22]

Regardless of the motives which lead to this type of legislation, or whether or not purchasers of stock should look to the financial conditions of the corporation as an indicia of true value rather than to the nominal or par value, it is difficult to see how the delivery of stock with no par value can satisfy a contract, governed by the laws of the instant jurisdiction, calling for the delivery of stock with a par value of $50. The difference in reference to the contract in question seems to be sufficiently substantial to justify the plaintiff's contentions. A share of corporate stock is not only a right to partake proportionately of the surplus profits of the corporation, but also to partake of the assets on dissolution.[23] Thus it would seem that any change which would affect those assets would be a material change. It is submitted that such a change was made in the instant case and for the following reason: A corporation in New York cannot issue stock with a nominal par value for less than the par value named.[24] Neither can a corporation make a binding agreement with a subscriber that he shall pay less than the par value of the stock subscribed to by him.[25] On the other hand stock without par value may be sold for its fair market value.[26] A thousand shares of $50 par value stock if sold in this State will increase the corporate funds $50,000. A thousand shares of non par value stock if sold in this State may increase the corporate funds considerably less. Certainty characterizes the one, uncertainty the other. That the $50 par value stock may not all be subscribed has nothing to do with the rights of a purchaser who has contracted for the stock on the assumption that everyone who contracts for the same stock will have to pay the same amount as he.

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[21] See White, *Corporations* (8th ed. 1915) pp. 372 *et seq;* Hollen and Tuthill, *Uses of Stock Having No Par Value* (1921) 7 Amer. Bar Ass'n. Journ. 579; Hurdman, *Capital Stock of No Par Value* (1919) Journal of Accountancy 246; Morawetz, *Shares Without Nominal or Par Value* (1913) 26 Harvard Law Rev. 729. [22] See (1921) 21 COLUMBIA LAW REV. 278.

[23] See *United States Radiator Corp.* v. *State of New York* (1913) 208 N. Y. 144, 149, 101 N. E. 783; *Burrall* v. *Buswick R. R.* (1878) 75 N. Y. 211, 216; *Fisher* v. *Essex Bank* (Mass. 1855) 5 Gray 373, 378.

[24] N. Y. Stock Corp. Law, § 55. This section contains the following provision: "Consideration for the issue of stocks and bonds. No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation."

See also, *Berger* v. *Nat. Architect's Bronze Co.* (1916) 173 App. Div. 680, 160 N. Y. Supp. 331; *Haule* v. *Consumers' Park Brewing Co.* (1912) 150 App. Div. 582, 135 N. Y. Supp. 900; *Stevens* v. *Episcopal Church History Co.* (1910) 140 App. Div. 570, 125 N. Y. Supp. 573; *Report of Attorney General* (N. Y. 1906) 220, 223.

[25] See *Meyer* v. *Blair* (1888) 109 N. Y. 600, 605, 17 N. E. 228; *cf. White Mts. R. R.* v. *Eastman* (1856) 34 N. H. 124 (agreement to take less stock than amount subscribed for). [26] N. Y. Stock Corp. Law, § 19.

Suppose in the instant case the defendant corporation became insolvent after having sold $50 par value stock to several subscribers for $25 per share. Creditors of the corporation could call upon those subscribers to pay the difference,[27] thereby increasing the assets available for distribution after payment of the debts. But if the defendant were permitted to change first to non par value stock, there would be no such increase. This alone, in many cases, might make considerable difference.

Furthermore, there seems to be a difference from the viewpoint of the future marketability of the stock. Even the most experienced do not always buy things after a careful investigation of all the facts necessary for sound judgment. Psychology is an important factor in all trading, and is especially so in stock trading. Can it be doubted that stock with a $100 par value selling for $1 is more appealing to those of speculative tendencies than the same stock selling at the same price but which had no nominal or par value to suggest a numerical difference? An analogous example of common knowledge is the case of foreign currency. Thousand mark notes of the German Republic have found ready sale when quoted at $1 a piece. Would there be such a ready sale were there no numerical designation to suggest that they were "a thousand to one shot?"

Because of the great facility which the non par value statutes afford a corporation to market its stock, this form of stock issue is bound to become more prevalent. The importance of the problems that are sure to arise,[28] both to corporations and the investing public can hardly be overestimated. It is to be hoped that if the instant case is appealed the higher courts will seize the opportunity afforded to clarify the situation.

STATE RIGHTS AND THE CHILD LABOR TAX LAW.—Taxation is usually thought of as a means of raising revenue for governmental purposes. Every exercise of the taxing power, however, has necessarily an effect upon social conditions. This being often very considerable, it follows that no government can afford to ignore it when considering the imposition of a tax,—a truth early recognized in analyses of the taxing power of the federal government.[1] Further, taxes designed largely or primarily to produce certain social consequences, and only secondarily to produce revenue, have never for that reason been rejected by the Supreme Court; the taxing power may be used for police purposes.[2] The theory on which such measures have been supported has been that the court will not question the good faith of the legislature, that if Congress has passed what purports to be a tax law, the courts must presume that it was intended to raise revenue, and must regard any social consequences, even consequent changes in matters left in constitutional theory solely to state control, merely as necessary incidents to the

[27] N. Y. Stock Corp. Law, § 56.

[28] For instance, a statute making non par stock taxable at a fixed valuation of $100 was recently held unconstitutional by the New York Court of Appeals. For a discussion of the case, see "Corporations—Taxation—Non Par Stock," a "Recent Decision" in this issue.

[1] See (1918) 18 COLUMBIA LAW REV. 460; Hamilton, *The Federalist* (1787) no. 12.

[2] *Veazie Bank* v. *Fenno* (1869) 8 Wall. 533; *In re Kollock* (1897) 165 U. S. 526, 17 Sup. Ct. 444; *Armour Packing Co.* v. *Lacy* (1906) 200 U. S. 226, 26 Sup. Ct. 232; *Quong Wing* v. *Kirkendall* (1912) 223 U. S. 59, 32 Sup. Ct. 192; *Rast* v. *Van Deman & Lewis* (1916) 240 U. S. 342, 36 Sup. Ct. 370; *United States* v. *Jin Fuey Moy* (1916) 241 U. S. 394, 36 Sup. Ct. 658; *United States* v. *Doremus* (1919) 249 U. S. 86, 39 Sup. Ct. 214; *Alaska Fish Co.* v. *Smith* (1921) 255 U. S. 44, 41 Sup. Ct. 219; *Kelly* v. *Lewellyn* (D. C. 1921) 274 Fed. 108; see *License Tax Cases* (1866) 5 Wall. 462, 473; *American Sugar Refining Co.* v. *Louisiana* (1900) 179 U. S. 89, 95, 21 Sup. Ct. 43; *Connolly* v. *Union Sewer Pipe Co.* (1902) 184 U. S. 540, 562, 563, 22 Sup. Ct. 431.